

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE:

B-219423.2

DATE: November 25, 1985

MATTER OF: Southwest Marine, Inc.--Request for
Reconsideration

DIGEST:

1. In order to prevail in a request for reconsideration of a prior decision, the requesting party must convincingly show either errors of fact or of law in the prior decision which warrant its reversal or modification.
2. Although the Commandant of the Coast Guard was not statutorily empowered at the time to execute the Determination and Findings (D&F) authorizing the negotiation of a vessel modernization procurement, GAO finds no legal error in its conclusion that the D&F may properly be reexecuted now by the Secretary of Transportation if she agrees that the procurement should have been negotiated originally.

Southwest Marine, Inc. requests reconsideration of one issue of our decision in Southwest Marine, Inc., B-219423, Sept. 23, 1985, 85-2 CPD ¶ _____. In that decision, we denied in part and dismissed in part Southwest's protest against the award of a contract under request for proposals (RFP) No. DTCG23-84-R-31014, issued by the United States Coast Guard, Department of Transportation. The procurement was for the modernization of 12 Coast Guard vessels. We found no merit in Southwest's allegation that the Coast Guard had improperly deviated from the solicitation's established evaluation scheme by awarding the contract to a higher priced, but technically superior, offeror.

However, material to this request for reconsideration, we did agree with Southwest that the Commandant of the Coast Guard was not statutorily empowered at the time the procurement was initiated to execute the Determination and

Findings (D&F) authorizing negotiation pursuant to 10 U.S.C. § 2304(a)(16) (1982). We noted that, under 10 U.S.C. § 2311, such authority was not delegable and was vested solely in the Secretary of Transportation, who is defined at 10 U.S.C. § 2302 as the head of the agency. Nonetheless, we did not find this to be a proper basis for sustaining the protest in view of our prior decision in Norton Co., Safety Products Division, 60 Comp. Gen. 341 (1981), 81-1 CPD ¶ 250, in which we held that a D&F improperly executed may later be reexecuted by an official authorized to do so. Moreover, we noted that the procurement was conducted prior to the enactment of the Competition in Contracting Act of 1984, 31 U.S.C.A. §§ 3551-3556 (West Supp. 1985), which has eliminated the requirements for the type of D&F in issue here and for the agency head to authorize such a procurement. Accordingly, we informed the Secretary of Transportation in our September 23 decision that she could validate the award by reexecuting the D&F if she agreed that the procurement should have been negotiated originally under 10 U.S.C. § 2304(a)(16).

Southwest now requests reconsideration on the ground that we legally erred in concluding that the Secretary of Transportation may properly reexecute the D&F after award. Southwest refers to various decisions^{1/} of the federal courts to support its essential position that administrative actions which violate the procurement statutes and regulations are void from the beginning and may not be subsequently ratified. Southwest also believes that our decision in Norton Co., Safety Products Division, 60 Comp. Gen. 341, supra, is inapplicable here because that case involved an unauthorized D&F which was reexecuted by the proper official only 16 days later and prior to the contract award. In contrast, Southwest points out that the D&F in issue here was executed by the Commandant of the Coast Guard nearly 2 years ago, and that the award has already been made.

In Southwest's view, the Secretary of Transportation has no real discretion in deciding whether or not to reexecute the D&F because she is faced with the onerous

^{1/}See United States v. Purcell Envelope Co., 249 U.S. 313 (1919); Superior Oil Co. v. Udall, 409 F.2d 1115 (D.C. Cir. 1969); City of Santa Clara, Cal. v. Andrus, 572 F.2d 660 (9th Cir. 1978), cert. denied, 439 U.S. 859 (1978); Delta Data Systems Corp. v. Webster, 744 F.2d 197 (D.C. Cir. 1984).

choice of either agreeing with prior action by the Commandant or risking substantial monetary claims if the contracts are now terminated.

In order to prevail in a request for reconsideration, the requesting party must convincingly show either errors of law or of fact in our prior decision which warrant its reversal or modification. Department of Labor--Reconsideration, B-214564.2, Jan. 3, 1985, 85-1 CPD ¶ 13. Southwest has not met that burden here.

We have reviewed the federal court decisions cited by Southwest in support of its request for reconsideration, and we do not believe that they are on point in the present matter since they do not involve a D&F executed pursuant to 10 U.S.C. § 2304(a)(16) by an agency official without the statutory authority to do so under 10 U.S.C. § 2311. Although we give due credence to the general principles that an administrative action taken in violation of statutory authorization or requirement is of no effect, City of Santa Clara, Cal. v. Andrus, supra n.1, 572 F.2d at 677, and that administrative discretion may not be exercised as an after thought, Superior Oil Co. v. Udall, supra n.1, 409 F.2d at 1121, we do not believe those principles are controlling in this case.

We point out to Southwest that the Claims Court and this Office have taken the view that once a contract comes into existence, it should not be canceled, that is, treated as void, even if improperly awarded, unless the illegality of the award is plain or palpable. John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964); Memorex Corp., B-213430.2, Oct. 23, 1984, 84-2 CPD ¶ 446. The essential test in determining whether an award is plainly or palpably illegal is whether the award was made contrary to statute or regulation due to some improper action by the contractor, or whether the contractor was on direct notice that the procedures followed were inconsistent with statutory or regulatory requirements. 52 Comp. Gen. 215 (1972); Computer Election Systems, Inc., B-195595, Dec. 18, 1979, 79-2 CPD ¶ 413. In short, where the deviation from the applicable statute or regulation is neither egregious nor obvious to the awardee, the contract award has not been treated as void. See Trilon Educational Corp. v. United States, 578 F.2d 1356 (Ct. Cl. 1978); Memorex Corp., B-213430.2, supra, 84-2 CPD ¶ 446 at 4.

In this matter, it is clear that the Commandant believed in good faith that he was empowered to execute a D&F authorizing negotiation of the procurement under 10 U.S.C. § 2304(a)(16). Although not addressed in our September 23 decision, we point out that 10 U.S.C. § 2302 originally provided that the term "head of an agency" included the Commandant of the Coast Guard. As explained by the historical notes to section 2302, the Secretary of the Treasury was substituted for the Commandant because the functions of the Coast Guard and its officers, while operating under the Department of the Treasury, were vested in the Secretary of the Treasury by 1950 Reorganization Plan No. 26, July 31, 1950, 64 Stat. 1280. Under that plan, the Secretary of the Treasury was authorized to delegate any of those functions to the agencies and employees of the Department of the Treasury, and the Coast Guard believed that, accordingly, the Secretary was authorized to delegate the D&F execution authority to the Commandant of the Coast Guard.

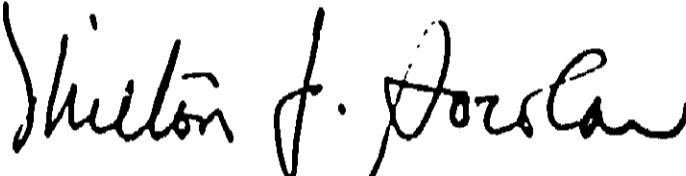
In its administrative report on Southwest's original protest, the Coast Guard relied upon this history of section 2302 for its view that, even though the Coast Guard had later been placed under the Department of Transportation, the Commandant retained the same delegated authority as he had had under the Department of the Treasury. However, we did not accept that view because the plain language of section 2302 provided that only the Secretary of Transportation was included within the term "head of an agency." Therefore, because 10 U.S.C. § 2311 precluded anyone other than the agency head from making a determination under 10 U.S.C. § 2304(a)(16), we concluded that Southwest was technically correct as to the Commandant's lack of authority to execute the D&F in question.

Nonetheless, because there was a lack of any suggestion that the Commandant intentionally sought to violate 10 U.S.C. § 2311, we believed that the improperly executed D&F only represented an administrative irregularity, which was not egregious in nature and certainly not obvious to the contract awardee. Therefore, the Commandant's improper action had not resulted in an award so plainly or palpably illegal as to require a finding that the contract was thereby void. Memorex Corp., B-213430.2, supra.

Accordingly, we informed the Secretary of Transportation of our conclusion so that she could decide whether or not to validate the award by reexecuting the

D&F. Even though we recognized that there was a much greater passage of time involved in this situation than in Norton Co., Safety Products Division, 60 Comp. Gen. 341, supra, we believed that our holding in that decision was equally applicable here. We further note in this regard that our consistent view has been that an agency's failure to prepare a D&F in a timely manner is a matter of form rather than substance which does not constitute a basis for sustaining a protest. Maremont Corp., 55 Comp. Gen. 1362 (1976), 76-2 CPD ¶ 181; Electronic Composition, Inc., B-186755, Feb. 15, 1977, 77-1 CPD ¶ 109. And, even where the agency never executed a D&F justifying the use of negotiation, and the record did not establish that the use of sealed bidding was not feasible, we declined to disturb the contract on that basis. Raytheon Co., B-184375, Jan. 28, 1976, 76-1 CPD ¶ 55.

Our prior decision is affirmed.

for 
Comptroller General
of the United States

END

**RAVEN SYSTEMS &
RESEARCH
INC.**

MICROGRAPHICS DIV.